BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEFF STRINGER, Claimant, v. WILLIAM BRYAN ROBINSON, d/b/a HIGHMARK CONSTRUCTION, Employer and RUSSELL G. GRIFFETH, d/b/a TETON PHYSICAL THERAPY, P.A., Employer and STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-025804** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed May 24, 2012**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on September 12, 2011. Claimant, Geff Stringer, was present in person and represented by Dennis Petersen, of Idaho Falls. Defendant, William Robinson, was represented by Larren Covert, of Idaho Falls. Defendants Russell Griffeth and State Insurance Fund were represented by Steven Fuller of Preston. The parties presented oral and documentary evidence. Briefs were later submitted and the matter came under advisement on February 6, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

The issues to be decided are:

1. Whether Claimant's work constituted causal employment, exempt from workers' compensation coverage;

2. Whether Claimant was an employee or independent contractor of Russell Griffeth at the time of the accident;

3. Whether Claimant was an employee or independent contractor of William Robinson at the time of the accident; and

4. Whether Russell Griffeth was the statutory employer of Claimant.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant was injured on September 4, 2009, when a falling beam fractured his ankle. Claimant asserts that he was an employee of Robinson and that Griffeth was Claimant's statutory employer pursuant to Idaho Code § 72-216.

All Defendants assert that Claimant's employment, if any, constituted casual employment exempt from workers' compensation coverage pursuant to Idaho Code § 72-212. All Defendants contend that Claimant was an independent contractor and not an employee at the time of his accident. Robinson contends that Claimant, if an employee at all, was an employee of Griffeth.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits 1-22, and Defendants' Exhibits A-D, admitted at the hearing; and

3. The testimony of Claimant, Russell Griffeth, and William Robinson, taken at the September 12, 2011 hearing.

All objections posed during the pre-hearing depositions are overruled.

FINDINGS OF FACT

1. **Claimant's background**. Claimant had resided in Twin Falls for seven months at the time of the hearing. He has worked in construction most of his adult life. Shortly prior to August 2009, he built custom homes in Island Park and Jackson Hole, and framed a motel in Idaho Falls.

2. **Robinson's background**. At the time of the hearing Robinson lived in Ammon and was employed at Pendleton Flour Mills as a maintenance mechanic. Prior to 2009, he was employed by and a supervisor in a framing company that framed churches. He also worked as a contractor and subcontractor doing framing and finish work. In approximately 2007, he owned and operated his own business, High Mark Construction, in which he employed several construction workers. At that time, Robinson had workers' compensation insurance coverage. Shortly before August 2009, he built a 5,000 square foot home. Robinson ceased carrying workers' compensation coverage prior to August 2009. He ceased operating his construction business in September 2009.

3. **Griffeth's background**. Griffeth is a practicing physical therapist, licensed since 1991. When he was 15, Griffeth worked for an electrician for two months but acquired no significant technical construction skills. He is not a licensed or trained contractor. Griffeth acted as his own general contractor in building his first and second homes. He organized subcontractors, but did not have the technical skills to do any of the building himself. Prior to

August 2009, Robinson knew Griffeth and installed interior trim and molding on Griffeth's home.

4. **Teton Physical Therapy addition**. Griffeth is the owner of Teton Physical Therapy. He and a physician own the property and building housing Teton Physical Therapy in Idaho Falls. In early 2009, Griffeth decided to add on to the existing building housing his physical therapy practice. With an architect he formulated plans and then sought a general contractor to build the 2,000 square foot addition. Griffeth wanted to be his own general contractor on the addition; however, the city required a licensed contractor for a commercial construction project. Griffeth obtained bids from several contractors, including Robinson, although Robinson's bid was less formal. Robinson did not initially have a contractor's license when they began discussing the project. However, he soon obtained one and Griffeth selected Robinson as the general contractor. Griffeth thought that Robinson had obtained workers' compensation insurance coverage, mistakenly believing that securing workers' compensation coverage was one prerequisite for obtaining a contractor license. Robinson was required to acquire liability insurance before obtaining his contractor license. He obtained liability insurance, but did not obtain workers' compensation insurance.

5. Griffeth and Robinson executed no written contract, but both understood that Robinson would oversee the construction of the addition and bid some parts of the project. Griffeth considered Robinson the general contractor for the addition, and agreed to pay Robinson $20.00 per hour for overseeing the addition construction. Additionally, Griffeth considered Robinson the subcontractor for framing and truss work, trim and finish work, roofing and demolition, and the attic and beam work required to join the new addition to the existing building. Robinson's bid for framing and truss work was approximately $14,000. His bid for

trim and finish work was $1,800. Robinson ordered the trim materials and Griffeth paid for them. Robinson performed attic and beam work based upon time and materials pursuant to a verbal agreement made when Griffeth decided to change part of the addition in late July or August. Griffeth expected Robinson to provide all labor needed to do the attic and beam work.

6. Griffeth and Robinson discussed and arranged for other subcontractors. Robinson submitted bills to Griffeth for payment. Griffeth selected some subcontractors without consulting Robinson. Robinson did not select any subcontractors without first consulting Griffeth. Griffeth obtained signed bids as contracts from some of the subcontractors. Griffeth arranged for subcontractors for excavation, foundation, sheet rocking, insulating, plumbing, and electrical work. Robinson estimated that Griffeth arranged for about two-thirds of the subcontractors himself. Robinson met with and coordinated scheduling with the electrical subcontractor. Griffeth regularly paid the subcontractors directly. Griffeth paid for nearly all of the materials. On four or five occasions Griffeth directly paid two individuals working under Robinson on the framing and attic projects. Griffeth did this at Robinson's request, to expedite payment to these individuals.

7. Robinson was not on the addition site every day; however, Griffeth was present every day while he continued his physical therapy practice in the existing facility, adjacent to the addition. Griffeth did not fire anyone off the project; however, he talked with the construction workers if he did not like the finished product. Griffeth received all of the bills relating to the addition either directly or from Robinson, and paid them.

8. Robinson was at the addition for framing from May until June. Robinson testified he only visited the job site once or twice from approximately July until mid-August. In mid-August, Robinson started installing trim.

9. **Claimant's work on the addition and in Shelley**. Approximately August 19, 2009, Robinson placed an ad on Craigslist seeking an experienced carpenter capable of doing trim work and beam work without training. At his deposition on January 11, 2011, Robinson testified as follows:

> Q. (By Mr. Petersen) So within the ad you put on Craigslist, you said independent contractor or what terminology? I'm not trying to put words in your mouth.
>
> A. I'm not sure independent contractor or whether I just said an independent carpenter is how I think I stated it.
>
> Q. Independent carpenter?
>
> A. Carpenter, exactly.

Robinson Deposition, p. 27, l. 24 through p. 28, l. 6. However, at the September 12, 2011, hearing, Robinson testified regarding the ad: "I remember it saying independent contractor." Transcript, p. 201, l. 25.

10. On August 19, 2009, Claimant saw the posting on Craigslist. Claimant responded and Robinson called and met Claimant the next day at Robinson's mother-in-law's home in Idaho Falls. Robinson described the anticipated trim and beam work at the Teton Physical Therapy addition. Robinson agreed to pay Claimant $13.50 per hour. Robinson testified he hired Claimant to "perform carpentry work, whatever was needed." Robinson Deposition, p. 28, ll. 19-20. Claimant was to keep track of his own hours. Claimant understood he would get paid every two weeks. They did not discuss withholding any taxes from his earnings. Robinson told Claimant to start work at 7:00 a.m. There was a key hidden by the addition door so Claimant had access to the addition. Either on August 20, 2009, or shortly thereafter, Robinson advised Claimant that he did not have workers' compensation insurance but would obtain it when he had

more money. Robinson told Claimant that he would try to arrange more jobs after the Teton Physical Therapy addition was completed.

11. On Friday, August 21, 2009, Claimant started work with Robinson. That day they picked up Robinson's trailer at Teton Physical Therapy which contained Robinson's tools, air compressors, skill saws, nail guns, and miter saws, and took the trailer to Shelley. Claimant rode with Robinson in his truck. In Shelley, they took measurements to repair a deck, then returned to Teton Physical Therapy, took the necessary tools into the addition, and Robinson showed Claimant the location for the trim. Claimant started installing trim on the addition. Claimant provided his own tool bag and hand tools. Robinson supplied table saws, compound miter saws, air compressors, nail guns, nails, and all other materials required. Robinson introduced Claimant to Griffeth on August 21.

12. Claimant's first day of work, August 21, 2009, happened to be a payday. Claimant worked and was paid by Robinson for eight hours that day. This included Claimant's time riding with Robinson, helping Robinson measure the deck in Shelley, and Claimant's work installing trim at the Teton Physical Therapy addition. Robinson paid Claimant with a personal check on Robinson's account. Claimant may have worked on August 22. He did not work on August 23, 2009.

13. On Monday, August 24, 2009, Claimant began working at 7:00 a.m. At Robinson's direction, Claimant and others went to a job site in Shelley for two hours and returned. Claimant then resumed trim installation on the addition. Claimant worked a total of 9.5 hours that day. On August 25, Claimant continued installing trim. Robinson helped install trim from time to time. Robinson was on and off the addition site most days. Claimant had sufficient expertise to install the trim himself. Although at one point, either that day or within

the next few days, Griffeth came out from the existing building and told Claimant he did not like gaps in the trim and that Claimant should close up the gaps. Claimant did not get into a discussion with Griffeth about trim installation because Claimant believed Robinson was his boss. Once when Claimant went outside the addition to smoke, Griffeth told Claimant not to waste time and to get back to work.

14. On August 26, 2009, Claimant continued installing trim. That day Robinson told Claimant there was a rush to complete the addition job and that Claimant could work as long as he wanted. Claimant worked 13 hours that day. Robinson continued to be present from time to time and helped install trim. Claimant estimated that about 25% of the time Robinson worked with him installing trim.

15. On August 27, 2009, Claimant continued installing trim. At Robinson's direction, Claimant also began helping with the ceiling and attic of the addition in preparation for placing beams. Robinson instructed Claimant to keep track of his hours spent installing trim separate from his hours spent working on the ceiling, attic and beams. Robinson paid Claimant at the same rate for all of the hours he worked, but Claimant thereafter kept track of his hours separately as directed. Claimant installed trim for eight hours and prepared for beam placement for five hours that day.

16. On August 28, 2009, Robinson directed Claimant to go to a house in Shelley and replace a door and several windows. Claimant did so. Robinson arrived at the house in Shelley as Claimant and two other individuals hired by Robinson, Roberto and Mario, completed the assigned work. Roberto told Claimant that he had worked for Robinson for three years. Mario started working for Robinson the week before Claimant began working on the addition.

Claimant then returned to Idaho Falls and continued the trim and beam preparation work on the addition. Claimant did not work on August 29 or 30, 2009.

17. On Monday, August 31, 2009, Claimant worked on the trim for nine hours and the beams for two hours. On September 1, 2009, Claimant continued to separately record his hours spent working on trim from his hours spent working on the attic and beams. Claimant worked with Roberto and Mario cleaning insulation from around the rafters in preparation for placing beams. Robinson was not present that day.

18. On September 2, 2009, Claimant worked in the ceiling cleaning out insulation and then did some trim work and framing. On September 3, 2009, Claimant finished all of the trim installation on the addition.

19. By September 4, 2009, Claimant was looking for and applied for work elsewhere because he was concerned about the safety of the addition job site. He believed Griffeth was really running the job. Claimant was not directing the beam work. He believed there were too few screws to securely fasten the brackets that were to support the beams. As preparations continued to set the beams, at least one rafter was cut to provide clearance to move the beams into position.

20. September 4, 2009, was a payday. Robinson turned in the hours worked by Claimant, Roberto, and Mario to Griffeth for payment. Griffeth never paid Claimant. Griffeth wrote Robinson a single check. Robinson paid Claimant in cash, but was short $150.00. Claimant advised Robinson he was short and Robinson agreed to pay Claimant the balance. Robinson paid him the $150.00 in cash about one week later. This constituted full payment for Claimant's hours installing trim and preparing to place beams on the addition, and installing windows and doors at the house in Shelley.

21. **Accident.** Pursuant to Robinson's direction, on Friday September 4, 2009, Claimant commenced working on the addition at 4:30 p.m., after Griffeth's physical therapy patients were gone. Griffeth let Robinson, Claimant, Mario, and Roberto into the building for work that afternoon. The addition was ready to be joined to the existing building. Claimant planned to work through the weekend to complete the addition project so that Griffeth could resume treating physical therapy patients on September 8, 2009, the day after Labor Day.

22. Robinson asked Griffeth to have some of his physical therapy staff stay after their usual work that day to help move beams. Griffeth had several of his physical therapy staff stay to help clean and move equipment. One of them helped move beams up to the attic. Robinson asked Claimant to help with the ceiling and specifically told Claimant to help lift the beams. Claimant, Robinson, Griffeth, Roberto, Mario, and some physical therapy staff gathered to help. Claimant and Griffeth talked while preparing to set the beams. Griffeth reminded Claimant to keep his hours for beam work separate from his hours for trim work.

23. As the beam work progressed on September 4, 2009, Robinson was in charge. Robinson began cutting beams, apparently with a chainsaw Claimant provided, and preparing to set them in place. Robinson, Roberto, and Claimant positioned themselves in the attic and helped lift a 14-foot beam. As they lifted the beam, the ceiling collapsed and all three of them, together with the beam, fell approximately 12 feet to the floor below. The falling beam struck Claimant's left lower extremity. He suffered a bimalleolar left ankle fracture. No one else was injured. After the accident, Griffeth asked Robinson if his workers' compensation insurance was in force and Robinson replied that he was not sure. Robinson helped Claimant to Griffeth's truck and Griffeth drove Claimant to the hospital. Griffeth later discovered that Robinson did not have workers' compensation coverage.

24. Claimant's wife's health insurance paid for a portion of the medical treatment required for Claimant's injuries. After recovering from his accident, Claimant worked for several months for his father's business. He also worked for several more months doing bridge demolition, repair and resurfacing in Idaho Falls and Oregon. At the time of the hearing, Claimant was unemployed.

25. **Credibility of the witnesses**. From August 21 to September 4, 2009, Claimant reported to the unemployment office that he was not working; when in fact he was working on the Teton Physical Therapy addition and the Shelley job site. Thus, at the time of the accident, Claimant was receiving unemployment benefits while he was working. He later repaid the unemployment benefits he had received for this period.

Having observed Claimant, Robinson, and Griffeth at hearing, and compared their testimony with other evidence in the record, the Referee found that none have a perfect memory; however, all are generally credible witnesses. Regarding those matters on which Claimant's and Robinson's testimony disagree, the Referee found that Claimant is the more credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

26. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

27. Initially, it must be determined with whom Claimant had a contractual relationship, and the nature of that relationship. Claimant contends that he was an employee, either of Griffeth or Robinson, and in the latter scenario, that Griffeth was his "statutory" employer. Robinson maintains that for the attic and beam work Claimant was performing at the time of his injury, Claimant was Griffeth's employee, or, in the alternative, an independent contractor. Griffeth contends that Claimant was not his direct employee, and that the relationship, if any, between Griffeth and Claimant can only be characterized as that of principal/independent contractor.

28. Turning first to the nature of the relationship between Griffeth and Claimant, Idaho Code § 72-102 defines employee, employer and independent contractor as follows:

> (12) "Employee" is synonymous with "workman" and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer. ....
>
> (13)(a) "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. ….
> ....
>
> (17) "Independent Contractor" means any person who renders service for a specified recompense for a specific result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished. ….

29. In Seward v. State Brand Division, 75 Idaho 467, 274 P.2d 993 (1954), Seward was injured while helping a state deputy brand inspector gratuitously examine brands at the express request of the deputy inspector. The Commission found that Seward was an independent livestock hauler, had previously helped with brand inspections on occasion, and was unaware that the deputy inspector had no authority to hire him. The Commission determined the accident

was compensable. The Idaho Supreme Court reversed noting there was no assertion or evidence the state brand inspector was aware of the deputy's actions. The Court declared:

> Before one can become the employee of another, knowledge and consent of the employer, expressed or implied, is required. …. Claimant did not have either an express oral or written agreement for employment and … the Deputy Brand Inspector at Idaho Falls had no power or authority to employ him, if he did. ….

Seward v. State Brand Division, 75 Idaho 467, 471-472, 274 P.2d 993, 997-998 (1954).

30. In the present case, there is no persuasive indication that Griffeth authorized Robinson to hire Claimant as Griffeth's employee. However, Claimant testified that he believed he was working for Griffeth on the attic and beam work. Robinson offered a similar statement. Claimant arrived at this conclusion because Griffeth instructed him to keep his hours separate for beam work as opposed to trim work, and shortly before the accident Griffeth told him to help lift the beams.

31. When closely questioned at hearing, Claimant testified that Robinson specifically asked Claimant to stay on and help with the roof and ceiling. Robinson had already told Claimant to keep his hours for trim and beam work separate because Griffeth had accepted Robinson's bid of $1,800.00 for trim installation, whereas Griffeth had agreed to pay Robinson for attic and beam work on the basis of materials and time, including the time of the workers hired by Robinson. Robinson had previously met with Claimant after he responded to the Craigslist posting for an experienced carpenter to do beam work and agreed to pay Claimant $13.50 per hour to work on the addition. Robinson had directed Claimant when to appear to work on the addition throughout the previous two weeks, including the very day of the accident, provided virtually all of the necessary tools, and directed the beam placement work. Robinson paid Claimant for all of his work hours, including his hours working on the attic and the beams.

32. Griffeth testified that Claimant worked for Robinson. Griffeth denied any agreement with Claimant as an employee or independent contractor. Griffeth testified that he may have verbally encouraged Claimant to be diligent as part of Robinson's crew, but Griffeth had no intention of hiring Claimant, did not agree to hire Claimant, and did not hire Claimant in any capacity.

33. Claimant acknowledged, and it is undisputed, that Griffeth provided no tools for use on any phase of the project, never discussed any rate of pay with Claimant, and never paid Claimant. Other than the instant claim for workers' compensation benefits, Claimant has never alleged any claim for compensation against Griffeth.

34. Given that the key for determining whether a direct employment relationship existed is whether the alleged employer had the right to control the time, manner, and method of executing the work, as distinguished from the right to merely require the results agreed upon, it is apparent in the present case that Griffeth did not assert or exercise the right to control Claimant's time, manner, or method of executing the attic and beam work. Furthermore, Griffeth did not assert even the right to merely require the results agreed upon, because there was no agreement regarding results between Griffeth and Claimant. The absence of these elementary indications of control undermines the assertion that Claimant was Griffeth's employee or independent contractor. No contract of hire, either as an employee or as an independent contractor, existed between Griffeth and Claimant. The record does not establish the assertion that Claimant was either Griffeth's employee or independent contractor.

35. No party has proven that Claimant was an employee or independent contractor of Griffeth at the time of the September 4, 2009 accident.

36. **Claimant's working relationship with Robinson.** The next inquiry is the nature

of the working relationship between Claimant and Robinson. Claimant acknowledges that he had no written contract of employment with Robinson, but asserts he was an employee of Robinson at the time of the accident. Griffeth and Robinson assert that Claimant was an independent contractor. The parties' dealings must be examined to determine the nature of the working relationship involved. Robinson asserts that Claimant's work on the beams and attic should be differentiated from his work on the trim and the rest of the addition in determining his status as an employee or independent contractor. This differentiation is immaterial inasmuch as Claimant was under Robinson's direction while working on the attic and beams and was not an employee or independent contractor of Griffeth.

37. Coverage under the workers' compensation law depends upon the existence of an employer-employee relationship. Anderson v. Gailey, 97 Idaho 813, 555 P.2d 144 (1976). "The determination of whether an injured party is an independent contractor or an employee is a factual determination to be made from full consideration of the facts and circumstances which are established by the evidence." Roman v. Horsley, 120 Idaho 136, 138, 814 P.2d 36, 38 (1991). The test for distinguishing an employee from an independent contractor has been stated:

> The ultimate question in finding an employment relationship is whether the employer assumes the right to control the times, manner and method of executing the work of the employee, as distinguished from the right merely to require certain definite results in conforming with the agreement. Four factors are traditionally used in determining whether a 'right to control' exists, including, (1) direct evidence of the right; (2) payment and method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the employment relationship at will and without liability.

Id.; quoting Burdick v. Thornton, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985); see also Stoica v. Pocol, 136 Idaho 661, 39 P.3d 601 (2001).

38. Direct evidence of control. The first factor distinguishing an employee from an

independent contractor is direct evidence of the right to control the manner and method of executing the work. If services must be rendered personally, then the right to control is suggested. Control is indicated if set hours of work are established by the person for whom services are performed. If the worker devotes substantially full-time to the business of the person for whom services are rendered, then such person has control over the amount of time the worker can work and impliedly restricts the worker from doing other gainful work. If a worker makes his services available to the general public on a regular and consistent basis, this indicates an independent contractor relationship. If the principal uses some competitive means for reducing his own cost in selecting a subcontractor, then the principal may be a prime contractor instead of an employer. A continuing relationship between the worker and the principal indicates a direct employment relationship, even if the work is performed at recurring irregular intervals. Stoica v. Pocol, 1999 IIC 0734.

39. In the present case, the posting on Craigslist to which Claimant responded was for an independent carpenter capable of both trim and beam work. Robinson testified that he told Claimant that he would be an independent contractor at the time of hiring. However, Claimant testified that Robinson indicated he would line up more jobs and obtain workers' compensation insurance when he got more money.

40. There is some indication that Robinson expected Claimant to personally render the services. Not surprisingly, Robinson discussed with Claimant his qualifications before hiring him. Robinson testified that he worked with Claimant on the first day to make sure Claimant "knew what he was doing." Robinson worked directly with Claimant most of his first two days. Claimant testified that Robinson supervised him almost every day while installing the trim. If there was a problem with the work, Claimant went to Robinson. While Claimant was

sufficiently skilled to install the trim without training, Robinson decided the sequence of the work. Robinson acknowledged that he generally told the workers what they were supposed to do for that day, although they sometimes worked on their own. Robinson never fully assigned or delegated the trim or beam work to Claimant. Rather, Claimant testified that approximately 25% of the time they worked together installing trim. Robinson was working alongside Claimant setting a beam at the time of the accident.

41. Robinson testified that the workers could decide the number of hours they worked each day and that he never provided a set schedule for anyone to start their work. However, there is some indication that Robinson controlled Claimant's hours. Claimant testified that Robinson directed him to start work at 7:00 a.m. each day, except the day of his accident when work started about 4:30 p.m. after Griffeth's physical therapy patients had left. Robinson did not recall instructing Claimant to begin at 7:00 a.m.; however, Robinson did acknowledge that it would not have been acceptable for Claimant to fail to show up for work on any given day. Additionally, Claimant initially worked approximately nine hours each day until Robinson advised him the addition had become a rush job and Claimant could work as long as he wanted. Thereafter Claimant worked nearly 13 hours daily.

42. Claimant worked substantially full-time for Robinson during the period in question. The record establishes that Claimant worked from approximately 9 to 13 hours per day, on the addition and on the project in Shelley, as directed by Robinson. Claimant's full-time hours of work for Robinson impliedly restricted Claimant from doing other gainful work.

43. It does not appear that Claimant offered his services to the general public during the time he was working with Robinson. Although Claimant performed work in Shelley during the same period he worked on the addition, Robinson told Claimant to perform the work in

Shelley and paid Claimant for it. There is no indication that Claimant performed any work other than that which Robinson assigned to him during this period.

44. Robinson and Claimant did not have a prior working relationship. This was the first time they had met or worked together. They only worked together approximately two weeks before the accident. All parties understood that the addition was a finite project. However, Robinson advised Claimant that after the addition was completed, he would try to get some other jobs going. Robinson in fact drove or sent Claimant on three occasions to work on another job in Shelley.

45. The extent of Robinson's control over the attic project was significant. Robinson acknowledged that he was the one in charge of beam setting on the evening that Claimant was injured. Robinson asked Griffeth to have some of his staff available to help move the beams. Robinson cut the beams to length that evening, apparently using Claimant's chainsaw. Robinson directed the mounting and fastening of the beam support brackets, including the number of screws used to mount the brackets, and effectively supervised the beam setting and securing efforts. The record establishes that at the time of Claimant's accident, Robinson was directing the installation of the beams; Claimant was merely helping to lift and carry a beam. There is no assertion or evidence that Claimant was in charge of actually setting the beams. Claimant's lack of control over the manner and method of executing the beam work is evidenced by his application for employment at another construction company two days before his accident because Claimant perceived the addition project was unsafe and someone else was controlling the method of placing the beams. Claimant testified that had the other construction company offered him a job, he "would have gone to work the next day"—which would have been the day prior to his accident. Transcript, p. 87, l. 17.

46. Examination of direct evidence of the right to control suggests that during the parties' dealings, Robinson assumed control over who Claimant worked for, when he started work, whether he worked at the Shelley site or on the addition, and the manner and methods of executing the work. Although Robinson's and Claimant's working relationship was brief, Robinson's level of control over Claimant's performance generally suggests a direct employment relationship.

47. Method of payment. The next factor in distinguishing an employee from an independent contractor is the method of payment. The method of payment test generally refers to whether income and social security taxes are withheld from a person's wages. Withholding is customary in an employer-employee relationship. Where the claimant was paid by the hour, but no income or social security taxes were withheld, the method of payment should be deemed a factor in favor of independent contractor status. Livingston v. Ireland Bank, 128 Idaho 66, 910 P.2d 738 (1995). Payment at regular periodic intervals generally suggests an employer-employee relationship. A worker who can realize a profit or suffer a loss as a result of his services (beyond the profit or loss ordinarily realized by employees) is generally an independent contractor. Stoica v. Pocol, 1999 IIC 0734.

48. In the present case, Robinson paid Claimant $13.50 per hour and made no deductions or withholdings from Claimant's check. Robinson did not provide Claimant with a 1099 because he did not perform a significant amount of work. Robinson paid Claimant regularly every other week. He paid Claimant via personal check the first time (August 21, 2009) and then with cash the second time (September 4, 2010), and with additional cash the following week. Robinson did not have a business account at any time during his work on Teton Physical Therapy. Robinson paid Claimant on August 21 from a draw he obtained from

Griffeth. Although Griffeth paid Mario and Roberto directly by check on at least two occasions when Robinson was unavailable or out of town, Griffeth never paid Claimant.

49. The manner of payment suggests an independent contractor relationship.

50. Furnishing major items of equipment. The next factor in distinguishing an employee from an independent contractor is whether the principal furnishes major items of equipment. If the person for whom services are performed furnishes significant tools, materials, or other equipment, this indicates a direct employment relationship. Hanson v. BCB, Inc., 114 Idaho 131, 754 P.2d 444 (1988).

51. In the present case, Claimant provided his own tool bag with usual hand tools. Claimant also provided a chainsaw to cut the beams to length. However, although Claimant provided the chainsaw, apparently both Claimant and Robinson used it to cut the beams. Robinson provided table saws, compound miter saws, air compressors, nail guns, a chain hoist, the trailer to house and transport the major equipment, and even the truck to transport Claimant to the Shelley job site on at least one occasion.

52. The record is clear that Claimant did not provide the major equipment used to complete the addition. Robinson provided the major equipment for Claimant's work on the addition. This factor clearly suggests a direct employment relationship.

53. Liability upon terminating relationship. The final factor in distinguishing an employee from an independent contractor is liability upon the termination of the work relationship.

> The retained right of discharge of the worker, or the right of either party to terminate the relationship without liability to the other party, is construed to be a strong, perhaps the strongest and most cogent, indication of retention of the power to control and direct the activities of the worker, and thus to control detail as to the manner and method of performance of the work.

> However, this Court in Beutler and other cases has been careful to distinguish the unqualified right to fire indicative of an employer-employee relationship from the right of a contracting principal to terminate the contract of an independent contractor for bona fide reasons of dissatisfaction.

Ledesma v. Bergeson, 99 Idaho 555, 585 P.2d 965 (1978).

54. In the present case, Robinson testified that he could have disciplined or fired Claimant for unsatisfactory performance. Robinson also testified that Claimant could have left in the middle of the trim installation, apparently without repercussion. Robinson testified that he was relying on Claimant to finish the beam project. However, the record establishes that when Claimant was injured and unable to continue working, at the very time when his services were most urgently needed because Griffeth risked financial loss if the work was not completed in time for him to resume treating physical therapy patients the following week, there was no suggestion that Claimant risked any liability whatsoever by not continuing to work on the addition or by not at least arranging for completion of the work by others. This factor is more consistent with a direct employment relationship.

55. The four factors that evaluate the right to control, and distinguish an employee from an independent contractor, are mixed. However, reviewing all of the factors, Robinson assumed more control than would have been expected in a principal-subcontractor relationship. Robinson directed Claimant when to work on the addition. Robinson told Claimant when to go to Shelley to work on different projects. Claimant rode in Robinson's truck on the first trip to Shelley. Robinson specified Claimant's starting time each work day. Robinson told Claimant when he could work more hours. Robinson essentially monopolized all of Claimant's available time for work during the relatively brief period of their working relationship. Robinson provided all of the tools, except the chainsaw, and the basic hand tools Claimant carried in his personal

tool bag. Apparently both Robinson and Claimant used Claimant's chainsaw. Robinson provided the nails and all of the fasteners. Robinson installed trim with Claimant. Robinson actually supervised the manner and method of placing the beams on the day of Claimant's injury. This suggests control consistent with an employer directing an employee in the manner, sequence, and timing of multiple work assignments. Considering all of the dealings between Robinson and Claimant, it appears that Robinson assumed control over Claimant's time, manner, and methods of working consistent with an employer-employee relationship.

56. "When doubt exists as to whether an individual is an employee or an independent contractor under Idaho's Workers' Compensation Act, the act must be given a liberal construction by the Industrial Commission in its fact finding function in favor of finding the relationship of employer and employee." Kiele v. Steve Henderson Logging, 127 Idaho 681, 684, 905 P.2d 82, 85 (1995).

57. Claimant has proven that he was an employee of Robinson at the time of the September 4, 2009 accident.

58. **Statutory employer analysis.** Having determined that Claimant was an employee of Robinson at the time of the accident, and had no direct contractual relationship with Griffeth, it is next necessary to consider whether Griffeth is nonetheless responsible for the payment of workers' compensation benefits to Claimant as Claimant's "statutory" employer pursuant to Idaho Code § 72-216.

59. Idaho Code § 72-102(13) (a) defines "Employer" as follows:

> "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the

workers there employed. If the employer is secured, it means his surety so far as applicable.

60. The statutory definition of "employer" is an expanded definition designed to prevent an employer from avoiding liability under the Workman's Compensation statute by subcontracting the work to others who may be irresponsible and not insure their employees. See Harpole v. State, 131 Idaho 437, 958 P.2d 594 (1998). Therefore, a statutory employer is anyone who, by contracting or subcontracting out services, is liable to pay workers' compensation benefits if the direct employer does not pay those benefits.

61. In recent years, there has been a good deal of discussion in Idaho case law concerning who is and who is not an "employer" for purposes of the statutory employer analysis. See Robison v. Bateman-Hall, Inc., 139 Idaho 207, 76 P.3d 951 (2003); Venters v. Sorrento Delaware, Inc., 141 Idaho 245, 108 P.3d 392 (2005); Kolar v. Cassia County Idaho, 142 Idaho 346, 127 P.3d 962 (2005); Pierce v. School Dist. # 21, 144 Idaho 537, 164 P.3d 871 (2007). It was the 1996 amendment to the provisions of Idaho Code § 72-223 that marked the significant increase in treatment of the statutory employer analysis by the Court. Prior to the 1996 amendment to Idaho Code § 72-223, that section provided for third party tort liability and specifically included certain statutory employers as third parties. However, following the 1996 amendments, the statute exempts from liability two classes of statutory employers:

1) "[T]hose employers described in Section 72-216, Idaho Code, having under them contractors or subcontractors who have in fact complied with the provisions of Section 72-301, Idaho Code. . ." ;

2) "[T]he owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workman there employed."

62. In connection with the amendment, the Robison Court noted:

> Thus, the main difference resulting from the 1996 amendment is the legislature has excluded from third-party tort liability two classes of employers, using substantially the same language used in the statutory definition of "employer." This Court determines, as a matter of law, that in so doing, the legislature intended to import the statutory employer analysis. The result of such a definition is a logical symmetry: those parties deemed employers for the purpose of being liable for worker's compensation benefits under I.C. § 72-102 are the same parties deemed immune from third-party tort liability under I.C. § 72-223. To hold otherwise would result in two different interpretations of the same terms in two different provisions of the Act. Such a result is incongruous and nonsensical. Fundamentally, if the legislature had intended I.C. § 72-223 to provide broader immunity, then it could have used language different from that used in I.C. § 72-102 and the definition of "employer."

Robison, supra.

63. Therefore, although the Court's treatment of the 1996 amendment in Robison, and several of the subsequent cases cited above, is geared towards ascertaining whether or not a party is immune from third party suit under the provisions of Idaho Code § 72-223, the analysis employed in Robison and its progeny, is equally instructive on the question of whether or not a party is or is not a "statutory" employer liable for the payment of workers' compensation benefits. In short, Robison, and the cases that followed it, contain the Court's most recent and probative analysis of who is and is not a statutory employer.

64. **Griffeth is not a category 2 employer**. As noted above, a category 2 employer is defined as the owner or lessee of the premises, or such other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor for any other reason, is not the direct employer of the workmen there employed. A category 2 statutory employer is the type of employer described in Harpole v. State, 131 Idaho 437, 958 P.2d 594 (1998). Under Harpole, in order to be a category 2 statutory employer, the work being carried out on the owner's premises must be of the type that could have been carried out by employees of the owner or proprietor in the course of its usual trade or

business. If the entity in question is normally equipped with manpower and tools to do a job, but nevertheless contracts it to another employer, then he is the statutory employer of the second employer's employees. Russell Griffeth, doing business as Teton Physical Therapy, was not in the business of constructing additions to his practice. Nor did he possess the tools or manpower to do the job himself, notwithstanding that certain of his employees may have assisted Robinson in the attic and beam work. The Commission concludes that Griffeth is not a category 2 statutory employer of Claimant.

65. **Griffeth is not a category 1 employer of claimant**. Griffeth also argues that he is not a category 1 statutory employer, i.e. one having under him contractors or subcontractors who have not complied with the provisions of Idaho Code § 72-301. Kolar, Venters and Pierce, strongly suggest that under the facts of this case, Griffeth does qualify as a category 1 employer, since a contractual chain links Griffeth to Claimant.

66. In Kolar, claimant was a direct employee of JUB. JUB, in turn, contracted with Burley Highway District to provide engineering services to a project near Albion, Idaho. Claimant suffered injuries when he was hit by a dump truck driven by a Burley Highway District employee. Claimant received workers' compensation benefits from JUB, and attempted to bring a third party action against the Burley Highway District. The Highway District defended the suit, arguing that it was immune from third party suit under the 1996 amendment to Idaho Code § 72-223. Central to the Court's analysis of the immunity question was whether the Burley Highway District was, in fact, a statutory employer. The Court ruled that the Burley Highway District did qualify as a category 1 employer. First, an "employer" is any person who has expressly or impliedly hired or contracted the services of another. This definition includes contractors and subcontractors. The evidence demonstrated that the Highway District contracted

the services of JUB. Therefore, the District was an employer within the meaning of that term as contemplated by Idaho Code § 72-223(1). Although the Highway District was not the direct employer of claimant, the Highway District had a contractual relationship with an entity under it (JUB) who was the injured worker's direct employer. The nature of the relationship in the instant matter is similar to the relationship between the parties in Kolar, Venters and Pierce.

67. Pierce is especially interesting for what it hints at, but does not decide. Pierce was a roofer employed by Jerry Kelly, a sole proprietor doing business as Top Roofing. Top Roofing contracted with School District No. 21 to repair the roofs of various school buildings. Kelly did not obtain workers' compensation insurance for his employees. While repairing the roof on the gymnasium, Pierce fell and was injured. As in the instant matter, Pierce sought workers' compensation benefits from the School District as his "statutory" employer. Citing Robison, Kolar and Venters, the Court discussed the characteristics of category 1 and category 2 statutory employers. Importantly, the Court intimated that the School District did qualify as a category 1 employer, because of the contractual relationship between the School District and Kelly, and Kelly and claimant. However, because the only theory argued to the Industrial Commission was whether the School District qualified as a category 2 statutory employer (it didn't), the Court declined to address the alternate basis for School District liability as a category 1 statutory employer. In the end, the Court upheld the Industrial Commission decision that since the School District was clearly not in the business of roofing, it did not qualify as a category 2 statutory employer, and thus, could not be held liable for the payment of workers' compensation benefits to claimant. Again, however, the decision hints that the District could have been found liable for the payment of workers' compensation benefits as a category 1 statutory employer. The facts of this case are much like those at issue in Pierce, but here, Griffeth has affirmatively

asserted that he is not a category 1 statutory employer. The facts belie this assertion. Griffeth entered into a contract with Robinson, a contractor, who in turn, employed Claimant. A contractual chain links Griffeth to Claimant.

68. The Commission therefore concludes that Griffeth initially qualifies as a category 1 statutory employer. However, it is to be noted that the provisions of Idaho Code § 72-216 contain an important caveat:

> Liability of employer to employees of contractors and subcontractors. An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

I.C. § 72-216(1). Emphasis added.

69. Griffeth argues that had Claimant actually been directly employed by him to perform work on the addition, his employment would have been deemed "casual," such that Griffeth would have had no obligation to provide workers' compensation coverage to Claimant. Therefore, the argument goes, even though he may be a category 1 statutory employer, he cannot be held liable for the payment of workers' compensation benefits, since his direct employment of Claimant would have been exempt employment.

70. Idaho Code § 72-212 provides in pertinent part:

> "**Exemption from coverage.** –None of the provisions of this law shall apply to the following employments unless coverage thereof is elected as provided in § 72-213, Idaho Code. …. (2) Casual employment."[1]

The employer bears the burden of proving an exception to coverage. Backsen v. Blauser, 95 Idaho 811, 520 P.2d 858 (1974).

[1] There is no indication Griffeth or Robinson elected coverage pursuant to Idaho Code § 72-213.

71. In Larson v. Bonneville Pacific Service Co., 117 Idaho 988, 989-990, 793 P.2d 220, 221-222 (1990), the Court stated:

> This Court has defined "casual employment" as employment that is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or to become necessary. It is employment that arises only occasionally or incidentally and is not part of the usual trade or business of the employer.

72. In Dawson v. Joe Chester Artificial Limb Company, 62 Idaho 508, 112 P.2d 494 (1941), the Court cited the casual employment exemption and denied workers' compensation benefits to a worker injured while remodeling a business, noting that the remodel was an incidental and occasional job for a limited and temporary purpose which was not regularly anticipated. In Bigley v. Smith, 64 Idaho 185, 129 P.2d 658 (1942), the owner of several rental buildings employed an individual to repair the buildings when necessary. The Court held that such constituted casual employment because it occurred at irregular intervals, depended on uncertain contingencies, and the amount of compensation depended on the length of time the employee was occupied at the particular job. In Shook v. Ray Palanco, dba Rays Roofing and Repair and Buy Wise Drug Store, Inc., 89 IWCD 28, p. 2672 (1989), the Commission found casual employment between a drug store owner and the employee of a roofing company hired to repair the store's roof, stating:

> The roof repair which precipitated the employment of Claimant arose occasionally or inadvertently, for a limited or temporary purpose. The necessity of roof repair occurs, if at all, at uncertain times or at irregular intervals, and its happening cannot be reasonably anticipated as likely to occur or become necessary. Moreover, roof repair is not a usual concomitant of the business, trade or profession of the retail drug store.

Shook, at 2674.

73. Casual employment as to Griffeth. In the present case, had Griffeth directly hired Claimant to perform work on the addition, the evidence is clear that constructing the addition

was at most an irregular or occasional function, not a predictable or regular part of Griffeth's physical therapy business. The addition project was an activity which would arise only occasionally, or at uncertain times and which could not reasonably be anticipated as certain or likely to occur in the future. Griffeth was in the business of physical therapy at all times. Constructing the addition to his physical therapy facility was not part of his usual trade and not an integral part of his physical therapy business. Had Griffeth hired Claimant directly to do this work, such employment would have been casual.

74. Griffeth has proven that direct employment of Claimant would constitute casual employment, exempt from workers' compensation requirements pursuant to Idaho Code § 72-212(2).

75. Therefore, though Griffeth is a category 1 statutory employer, Claimant has ultimately failed to satisfy one of the important prerequisites to Idaho Code § 72-216 liability. Because Claimant's direct employment by Griffeth to perform the attic and beam work would be described as casual, Claimant has failed to demonstrate that Griffeth would have had any responsibility for the payment of workers' compensation benefits to Claimant had he directly hired Claimant. Therefore, Griffeth is not liable for payment of workers' compensation benefits as a statutory employer under Idaho Code § 72-216.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he was a direct employee of Griffeth at the time of the accident.

2. Claimant has met his burden of proving that he was a direct employee of Robinson at the time of the September 4, 2009 accident.

3. Robinson has failed to prove that a principal/independent contractor relationship existed between he and Claimant as of the date of the September 4, 2009 accident.

4. Griffeth has established that even if it had been Claimant's direct employer, such employment would necessarily be deemed "casual," such that Griffeth would not be considered to be a category 1 statutory employer liable for the payment of benefits under Idaho Code § 72-216.

5. Claimant has failed to demonstrate that Griffeth qualifies as a category 2 statutory employer.

ORDER

Based on the foregoing, the Commission hereby ORDERS the following:

1. Claimant has failed to prove that he was a direct employee of Griffeth at the time of the accident.

2. Claimant has met his burden of proving that he was a direct employee of Robinson at the time of the September 4, 2009 accident.

3. Robinson has failed to prove that a principal/independent contractor relationship existed between he and Claimant as of the date of the September 4, 2009 accident.

4. Griffeth has established that even if it had been Claimant's direct employer, such employment would necessarily be deemed "casual," such that Griffeth would not be considered to be a category 1 statutory employer liable for the payment of benefits under Idaho Code § 72-216.

5. Claimant has failed to demonstrate that Griffeth qualifies as a category 2 statutory employer.

6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all

matters adjudicated.

DATED this __24th____ day of May, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R. D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _24th_____ day of __May_____, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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